

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 8, 2006

LARRY G. HENDERSON, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2000-C-1393 Mark J. Fishburn, Judge

No. M2005-02780-CCA-R3-PC - Filed January 23, 2007

Larry G. Henderson, Jr., the petitioner, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief, through which he had challenged his 2004, guilty-pleaded conviction of second degree murder. The petitioner claimed that the guilty plea was the product of ineffective assistance of counsel, and the post-conviction court conducted an evidentiary hearing on April 6, 2005. On October 11, 2005, the court entered its written findings of fact and conclusions of law and entered an order denying relief. The post-conviction court's order is supported in the record, and we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Dominic J. Leonardo, Nashville, Tennessee, for the Appellant, Larry G. Henderson, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The record before us reveals that the petitioner was indicted for the June 19, 2000 first degree murder of Robert J. Moore. Four days before his trial was to begin, the petitioner pleaded guilty to second degree murder and agreed to a sentence of 22 years.

In the post-conviction evidentiary hearing, the petitioner testified that his trial attorney failed to inform him about the principles of sentence enhancement, including the presumptive sentence of 20 years. He testified that, had he known about the presumptive sentence, he would have submitted an open plea without a sentencing recommendation in lieu of accepting a sentence in excess of 20 years.

The petitioner testified that he asked his counsel to provide him the videotape of his pretrial interrogation, but he was not allowed to view the tape until the suppression hearing. At this point, he testified, the portion of the tape on which he asked for counsel had been excised.

The petitioner testified that his counsel said that Sara Russell, a key witness, was unavailable to interview; however, on Friday before the trial was to begin on Monday, the State found her. Counsel informed the petitioner that Ms. Russell had changed her story and would implicate the petitioner in the murder. The petitioner testified that, had he known earlier about Ms. Russell's impending testimony, he would have accepted the State's offer of a 15-year sentence.

The petitioner testified that he received no preliminary hearing and that, when he hired his trial counsel following the indictment, counsel promised that he would obtain a preliminary hearing. The petitioner testified that he never received a preliminary hearing.

The petitioner's trial counsel testified that he spent over 120 hours in preparation for the petitioner's trial. As of the Friday before the Monday trial, he had spoken with all of the State's witnesses, including Sara Russell. Ms. Russell intended to testify that she saw the petitioner shoot the victim, who was begging for his life. Also, another prospective witness, Mario Polk, had told counsel that the petitioner had bragged about killing the victim.

Counsel testified that he gave the petitioner a transcript of his entire pretrial interrogation; the petitioner had no facilities for viewing the videotape in jail. Counsel filed an extensive motion to suppress the petitioner's pretrial statement, but the trial court overruled the motion on the Friday before the trial was to begin on Monday. Counsel discussed the possibility of an interlocutory appeal with the petitioner.

Counsel testified that he had advised the petitioner not to testify at trial because he had been convicted previously of attempted especially aggravated robbery, Class C felony drug possession, and felony evasion of arrest. Counsel testified that he explained to the petitioner that, based upon the prior convictions, he could be sentenced as a Range II offender, in which case his presumptive sentence for second degree murder would be 32 years.

Counsel testified that he moved in limine to have the trial court exclude several letters the petitioner had written and was partially successful in that the trial court allowed only some of the letters and redacted certain material from the others. Counsel opined that content of some of the allowed letters would have been detrimental to the defense: the petitioner's claims of having killed other people, threats to injure or kill witnesses, and references to the victim as a "punk" and to the victim's begging for his life before the petitioner shot him.

On cross-examination, counsel testified that he believed the petitioner understood the applicable sentencing scheme; the petitioner sent letters to counsel in which the petitioner demonstrated his comprehension of the range classifications and presumptive sentence.

Counsel denied that he even received a 15-year plea offer from the State and testified that the State's first offer was 25 years.

Counsel did not recall promising the petitioner that he would obtain a preliminary hearing.

In the post-conviction court's October 11, 2005 findings of fact and conclusions of law, the court stated that the petitioner had no facilities for viewing a videotape in jail and that counsel, in furnishing a transcript of the entire tape, availed the petitioner the next best alternative for reviewing the interrogation and pretrial statement. The court found that Sara Russell was not available until four days before trial, at which time counsel interviewed her and ascertained her intention to implicate the petitioner in the murder. The court found that the petitioner intended to go to trial so long as prospective witnesses against him were unlikely to testify but that as soon as the State's prospects for a conviction improved through the trial court's rulings on pretrial motions and the appearance of Ms. Russell, he opted to plead guilty to second degree murder. The court found that counsel had adequately communicated with the petitioner and ruled that counsel had rendered effective assistance.

In his timely appeal, the petitioner claims that the post-conviction court erroneously determined that trial counsel was effective, that the court failed to address all of the issues raised in the twice-amended petition for post-conviction relief, and that the court failed to file its findings and order within 60 days of the hearing. We discern no cause for reversal and affirm the post-conviction court's order.

In post-conviction proceedings, the petitioner has the burden of proving by clear and convincing evidence the claims raised. T.C.A. § 40-30-110(f) (2003). On appeal, the lower court's findings of fact are reviewed de novo with a presumption of correctness that may only be overcome if the evidence preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). "Claims of ineffective assistance of counsel are considered mixed questions of law and fact and are subject to de novo review." *Serrano v. State*, 133 S.W.3d 599, 603 (Tenn. 2004); see *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner challenges the effective assistance of counsel, he has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel's services fall below the range of competence demanded of attorneys in criminal cases. *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994). Courts need not address both *Strickland* components in any particular order or even address both if the petitioner fails to meet his burden with respect to one. *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). On review, there is a strong presumption of satisfactory representation. *Barr v. State*, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

In evaluating counsel's performance, this court should not examine every allegedly deficient act or omission in isolation, but rather we view the performance in the context of the case as a whole. *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The primary concern of the court should be the fundamental fairness of the proceeding being challenged. *Id.* Therefore, this court should not second-guess tactical and strategic decisions of defense counsel. *Henley*, 960 S.W.2d at 579. Instead, this court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. *Id.*; *see also Irick v. State*, 973 S.W.2d 643, 652 (Tenn. Crim. App. 1998).

When it is alleged that the ineffective assistance of counsel resulted in a guilty plea, the burden is upon the petitioner to establish the prejudice prong of *Strickland* by proving that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

I

First, we address the petitioner's claim that the court erred in not concluding that the guilty plea resulted from ineffective assistance of counsel. The post-conviction court's order expresses strong reliance upon the testimony of trial counsel, who articulated extensive investigation and trial preparation, regular communication with the petitioner, and an apt advocacy of pretrial motions. The court discerned no deficiencies of performance in counsel's handling of the pretrial-interrogation videotape or the investigation of Sara Russell. The court determined that the petitioner pleaded guilty because of the monolith of evidence amassed against him and not because his trial counsel had imparted inadequate information to him. On these issues, the record supports the court's determinations that trial counsel rendered effective assistance.

II

Next, we review the petitioner's complaint that the post-conviction court failed to address counsel's lapse in securing a preliminary hearing and failed to specifically address counsel's failure to inform the petitioner about the Range I presumptive sentence for second degree murder. We agree that a post-conviction court is constrained to "state the findings of fact and conclusions of law with regard to each [post-conviction] ground," T.C. A. § 40-30-111(b) (2003), but we find no lapse of the court's duties in the present case that would justify any relief to the petitioner. *See Donald Mays v. State*, No.W2003-02761-CCA-R3-PC, slip op. at 7 (Tenn. Crim. App., Jackson, Oct. 28, 2004) (commenting that although Tennessee Code Annotated section 40-30-111(b) is mandatory, "the purpose of the statutory requirement was to facilitate appellate review and that reversal was not required when the record included the post-conviction court's basis for denial of relief on a particular ground").

We review the post-conviction court's failure to specifically adjudicate the issue of counsel's alleged failure to inform the petitioner about the presumptive, 20-year, Range I sentence for second degree murder. First, the post-conviction court accredited trial counsel's testimony,

which included counsel's affirmations that he communicated with the petitioner relative to the presumptive sentence and the general methodology of sentencing. Second, even if we do not assume that the court accredited this specific testimony of counsel, we see in the record that the petitioner was classifiable as a Range II offender, *see* T.C.A. § 40-35-106(a) (2003), and we know that in 2004 the presumptive sentence in that range for second degree murder, a Class A felony, was 32 years, *see id.* § 40-35-112(b)(1); § 40-35-210(e) (amended 2005). In this circumstance, even if the petitioner was unaware of the presumptive sentence for Range I, we fail to discern how the knowledge could have affected his plea decision. An "open" plea would have left him vulnerable to a Range II classification, and even if the State had agreed to an open Range I plea, his Range I sentence would have been subject to enhancement based upon his prior convictions. *See id.* § 40-35-105(a); § 40-35-114(2) (amended 2005). Finally, it is clear from the post-conviction court's findings that the overriding factor in the petitioner's plea was not the functioning of a presumptive sentence but rather the turning of the evidence tide against him. The petitioner had declined to plead, but on the Friday before the Monday trial, a guilty plea was impelled by the appearance of prosecution witnesses and the trial court's decision to allow incriminating evidence from the petitioner's letters. Thus, we discern a basis for the denial of post-conviction relief despite the court's lack of specific reference to the issue of counsel's advice concerning a presumptive sentence.

Next, we examine the claims that counsel breached a promise to the petitioner to secure a preliminary hearing and that the post-conviction court failed to address the issue. The petitioner claimed that, when he hired counsel, counsel promised to obtain, post-indictment, a preliminary hearing. *See* Tenn. R. Crim. P. 5(e) (providing for a preliminary hearing when an indictment is issued "while the preliminary hearing is being continued"). We recognize that the preliminary hearing in Tennessee "is a 'critical stage' of the criminal prosecution and that its importance to the defense as a discovery tool" should not be ignored. *State v. Graves*, 126 S.W.3d 873, 877 (Tenn. 2003) (quoting *McKeldin v. State*, 516 S.W.2d 82, 85-86 (Tenn. 1974)). The petitioner, however, is mounting a collateral attack in the form of a post-conviction relief action, and as we expressed above, he is obliged to demonstrate, *inter alia*, that he was prejudiced by counsel's actions or omissions. In the evidentiary hearing, the petitioner articulated nothing more about the lack of a preliminary hearing than that counsel failed to fulfill a promise to obtain one. He neither claimed nor demonstrated any prejudice as a result of having no preliminary hearing. Thus, notwithstanding the post-conviction court's failure to mention the issue in its findings, the record is utterly devoid of any basis for relief on this issue.

III

Finally, we turn to the petitioner's claim that he merits relief because the post-conviction court failed to file its findings and order within 60 days of the evidentiary hearing. Tennessee Code Annotated section 40-30-111(d) provides, "The [post-conviction] court shall rule within sixty (60) days of conclusion of the proof. Such deadline shall not be extended by agreement [and] . . . may be extended only by order of the court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity." T.C.A. § 40-30-111(d) (2003); *see also*

Tenn. S. Ct. R. 28 § 9(A). In the present case, the evidentiary hearing was held on April 6, 2005, and the court filed its findings and order on October 11, 2005.

Although the post-conviction court obviously did not honor the 60-day rule, “there is no indication from the language of the Post-Conviction Procedure Act that a petitioner is entitled to relief simply because of non-compliance of performing an act within a certain period of time.” *Juan Alfonzo Hill v. State*, No. E2004-02915-CCA-R3-PC, slip op. at 9 (Tenn. Crim. App., Knoxville, Sept. 19, 2005). In rejecting a claim for relief based upon a 14-month delay between the conclusion of the post-conviction hearing and the court’s ruling, this court has focused upon the petitioner’s having “had a full and fair hearing” and his failure to “allege any prejudice as a result of the delay.” *Kelvin Wade Cloyd v. State*, No. E2003-00125-CCA-R3-PC, slip op. at 19 (Tenn. Crim. App., Knoxville, Nov. 3, 2003). The appellate court is “without the authority to amend either the Post Conviction Procedure Act or the applicable supreme court rules” to insert sanctions for a post-conviction court’s failure to comply with the 60-day rule. *Id.*

In the present case, the petitioner received a full and fair hearing and points to no prejudice as a result of the six-month interval between the evidentiary hearing and the filing of the court’s order. Consequently, he presents no basis for relief on this issue.

IV

In conclusion, we see no basis for disturbing the post-conviction court’s ruling. We affirm the order denying post-conviction relief.

JAMES CURWOOD WITT, JR., JUDGE